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King Ban Siang v Gan Peck Cheng

HIGH COURT (MUAR) — ELECTION PETITION NO 26PP-2–06 OF 2013
SURAYA OTHMAN J
1 AUGUST 2013

Election — Petition — Allegation of corrupt or illegal practice — Allegation of offence of treating by providing food and drinks — Allegation of offence of promoting ill-will, discontent or hostility between voters — Whether corruptly influencing voters to vote or refrain from voting — Whether election should declared void — Failure to plead material facts — Election petition rendered fundamentally defective — Election Offences Act 1954 ss 4A, 8, 11(1)(d) & 32(c)

Election — Petition — Defective petition — Failure to plead material facts — Allegation of corrupt or illegal practice by candidate — Petitioner failing to plead s 11 of the Election Offences Act 1954 ('the Act') in connection with his reliance on s 32 of the Act — Failure to plead material facts under ss 8 and 4A of the Act — Election petition rendered fundamentally defective — Election Petition Rules 1954 r 4(1)(b), (2) & (4)

During the 2013 General Election, the petitioner stood as the *Barisan Nasional* ('BN') candidate for the State Constituency of *Dewan Undangan Negeri* N23 Penggaram Johor against the respondent, a Democratic Action Party's ('DAP') candidate. The petitioner lost in the election. The petitioner filed this election petition challenging the result of the election alleging non-compliance or offences being committed by the respondent. The petitioner alleged that the respondent committed the offence of treating under s 8 of the Election Offences Act 1954 ('the EO Act') by providing food and drinks on 18 May 2013 to the voters of N23 Penggaram for the purpose of corruptly influencing the voters to vote or refrain from voting and thus the election should be declared void under s 32(c) of the EO Act due to corruption. The second allegation pertained s 11(1)(d) of the EO Act for publishing false statement of fact in relation to the personal character or conduct of a candidate which affected the return of the candidate. The petitioner claimed that this was by way of putting up banners which contained the words 'Ubah Sekarang Bersihkan Malaysia' (Change Now Clean Up Malaysia) in the vicinity of N23 Penggaram and in doing so the respondent had committed the offence under s 4A of the EO Act of promoting ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia which resulted in the respondent winning the election. The respondent raised preliminary objections on grounds of

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non-compliance with r 4(1)(b), 4(2) and 4(4) of the Election Petition Rules 1954 ('the EP Rules') and due to the petitioner's failure to plead s 11 in connection with his reliance on s 32 of the EO Act for a declaration that the election be declared void due to the commission of a corrupt or illegal practice by the candidate or his agent.

Held, allowing the preliminary objections and striking out the petition with costs of RM20,000:

(1) To sustain an election petition under s 32(a) or (c) of the EO Act, the material facts to be pleaded as required by r 4 of the EP Rules, are the elements that constitute the offence of bribery (or corruption). The requirements of r 4 are mandatory (see para 11).

(2) The petitioner's failure to plead s 11(1)(b) of the EO Act rendered all the complaints specified in the election petition fundamentally defective. This was so since without the reliance of s 11(1)(b) of the EO Act which makes treating an offence of corrupt practice, there was an essential missing link between s 8 of the EO Act which merely defines what is treating, and s 32(c) of the EO Act which enacts corrupt practice as a ground to avoid the election. To make good a charge under s 32(c) of the EO Act which concerns corrupt practice, s 11(1)(b) of the EO Act is therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action. Due to the failure to do so, the first complaints should be dismissed (see para 25).

(3) The election petition must contain material facts and sufficient particulars of the complaints pursuant to r 4(1)(b) and 4(4)(3) of the EP Rules. The facts to be pleaded pursuant to r 4(1)(b) and 4(4)(3) must be such as to make out a case for the petitioner. Failure to comply with this mandatory requirement will render the petition defective (see paras 26 & 28).

(4) There was no explanation or elaboration in the petition as to how the 'treating' of the voters to food and drinks had reaped votes for the respondent. There was no evidence that the food was provided to influence the voting. The mere fact that food and drinks were provided did not give rise to any inference that it was corruptly given to influence voting. To succeed under s 8, the petitioner had to disclose in the petition that: (a) first, the identity of persons who are said to have been influenced by the respondent to vote for him on account of treating; and (b) second, that those identified persons were indeed influenced by the respondent and voted for him as a result of such treating. The petition had no such details regarding these matters. The petitioner had failed to provide sufficient facts or particulars of corrupt practice which would bring the petition within ss 8, 11(1)(b) and 32(c) of the EO Act (see paras 32–36).

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(5) With regards, the second complaint, s 4A of the EO Act is specific in nature. The allegations by the petitioner were too general and did not go down to specifics. For it to come within the purview of s 4A, the petitioner had to state or illustrate how the publication of the banners had promoted feelings of ill-will, discontent and hostility. Hence, the petitioner failed to plead sufficient facts or circumstances as required under r 4(1)(b) and 4(4)(3) of the EP Rules to constitute a cause of action so as to make out a case for the petitioner under s 4A read together with ss 11(1)(d) and 32(c) of the EO Act (see paras 48–49 & 52).

[Bahasa Malaysia summary

Semasa Pilihan Raya Am 2013, pempetisyen bertindak sebagai calon bagi Dewan Undangan Negeri Kawasan N23 Penggaram Johor terhadap responden, seorang calon *Democratic Action Party* ('DAP'). Pempetisyen kalah dalam pilihan raya tersebut. Pempetisyen memfailkan petisyen pilihan raya ini bagi mencabar keputusan petisyen yang mendakwa ketidakpatuhan atau kesalahan-kesalahan yang didakwa dilakukan oleh responden. Pempetisyen mendakwa bahawa responden melakukan kesalahan penjamuan di bawah s 8 Akta Kesalahan Pilihan Raya 1954 ('Akta') dengan menyediakan makanan dan minuman pada 18 Mei 2013 kepada pengundi-pengundi N23 Penggaram bagi tujuan secara rasuah mempengaruhi pengundi-pengundi untuk mengundi atau menahan daripada mengundi dan kemudian pilihan raya wajar diisytiharkan sebagai tidak sah di bawah s 32(c) Akta kerana rasuah. Dakwaan kedua adalah berkenaan s 11(1)(d) Akta kerana menerbitkan kenyataan-kenyataan palsu mengenai keperibadian atau perlakuan calon yang memberi kesan kepada calon. Pempetisyen mendakwa bahawa ini adalah dengan meletakkan sepanduk-sepanduk yang mengandungi perkataan-perkataan 'Ubah Sekarang Bersihkan Malaysia' (*Change Now Clean Up Malaysia*) dalam kawasan N23 Penggaram dan dengan berbuat demikian, responden telah melakukan kesalahan di bawah s 4A Akta kerana menganjurkan niat buruk, ketidakpuasan hati dan permusuhan antara individu-individu sesama bangsa atau berlainan bangsa atau sama atau berlainan kelas populasi Malaysia yang mengakibatkan responden memenangi pilihan raya tersebut. Responden membangkitkan bantahan awalan atas dasar ketidakpatuhan kaedah 4(1)(b), 4(2) dan 4(4) Kaedah-kaedah Petisyen Pilihan Raya 1954 ('Kaedah') dan atas kegagalan pempetisyen memplidkan s 11 berkenaan pergantungannya pada s 32 Akta bagi deklarasi bahawa pilihan raya diisytiharkan sebagai tidak sah kerana perlakuan rasuah atau amalan tidak sah oleh calon atau ejennya.

Diputuskan, membenarkan bantahan awalan dan membatalkan petisyen dengan kos sebanyak RM20,000:

(1) Untuk mengekalkan sesuatu petisyen pilihan raya di bawah s 32(a) atau (c) Akta, fakta material yang harus diplidkan seperti yang diperlukan

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oleh Kaedah 4, adalah elemen-elemen yang terjumlah kepada kesalahan merasuah. Keperluan kaedah 4 adalah mandatori (lihat perenggan 11)

(2) Kegagalan pempetisyen memplidkan s 11(1)(b) Akta menjadikan kesemua aduan-aduan yang dinyatakan dalam petisyen pilihan raya sebagai cacat pada asasnya. Ini adalah kerana tanpa pergantungan kepada s 11(1)(b) Akta yang menjadikan menjamu satu kesalahan amalan rasuah, tiada pengantara penting antara s 8 Akta yang sekadar memberi definisi apakah menjamu dan s 32 Akta yang memperuntukkan amalan rasuah sebagai alasan untuk mengelakkan petisyen. Untuk memanfaatkan pertuduhan di bawah s 32(c) Akta berkenaan amalan rasuah, s 11(1)(b) Akta adalah dengan itu menjadi keperluan mandatori bagi memperuntukkan pengantara penting untuk mewujudkan kausa tindakan. Atas kegagalan berbuat sedemikian, aduan pertama hendaklah ditolak (lihat perenggan 25).

(3) Petisyen pilihan raya mestilah mengandungi fakta material dan butiran yang cukup mengenai aduan di bawah kaedah 4(1)(b) dan 4(4)(3). Fakta yang hendak diplidkan di bawah kaedah (1)(b) dan 4(4)(3) mestilah sedemikian rupa di mana ia mewujudkan kes bagi pempetisyen. Kegagalan untuk mematuhi keperluan mandatori ini menjadikan petisyen cacat (lihat perenggan 26 & 28).

(4) Tiada penjelasan mahupun penerangan lanjut dalam petisyen tentang bagaimana menjamu pengundi-pengundi dengan makanan dan minuman telah meraih undi daripada responden. Tiada keterangan bahawa makanan telah diperuntukkan untuk mempengaruhi undi. Sekadar fakta bahawa makanan dan minuman diberikan tidak membangkitkan sebarang kesimpulan bahawa ia telah diberi secara rasuah untuk mempengaruhi undian. Untuk berjaya di bawah s 8, pempetisyen harus mendedahkan di dalam petisyen bahawa: pertamanya, identiti orang-orang yang dikatakan telah dipengaruhi oleh responden untuk mengundi untuknya atas dasar penjamuan; dan kedua, bahawa kesemua orang yang telah dikenalpasti telah dipengaruhi oleh responden dan mengundi untuknya akibat penjamuan tersebut. Petisyen tidak mempunyai butiran-butiran berkenaan perkara-perkara tersebut. Petisyen telah gagal mengemukakan fakta atau butiran mengenai amalan rasuah dengan secukupnya yang boleh membawa petisyen di bawah ss 8, 11(1) dan 32(c) Akta (lihat perenggan 32–36).

(5) Berkenaan aduan kedua, s 4A Akta bersifat spesifik. Dakwaan-dakwaan oleh pempetisyen adalah terlalu am dan tidak spesifik. Untuknya terjumlah di bawah bidang kuasa s 4A, pempetisyen harus menyatakan atau menggambarkan bagaimana penerbitan sepanduk-sepanduk tersebut telah menganjurkan perasaan benci, ketidakpuasan hati dan permusuhan. Oleh itu, pempetisyen gagal memplidkan fakta yang secukupnya seperti yang diperlukan di bawah kaedah 4(1)(b) dan 4(4)(3)

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untuk membentuk kausa tindakan agar mewujudkan kes bagi pempetisyen di bawah s 4A dibaca bersama-sama dengan ss 11(1)(d) dan 32(c) Akta (lihat perenggan 48–49 & 52).]

Notes

For cases on allegation of corrupt and illegal practices, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2125–2129.

For cases on defective petition, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2180–2187.

Cases referred to

Abd Hamed bin Mamat lwn Uz Baharuddin bin Mohd dan lain-lain [1992] MLJU 83; [1993] 1 AMR 1, HC (refd)

Abdul Karim v Mohamed Taib & Anor [1969] 2 MLJ 72 (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

Chiew Chiu Sing v Datuk Celestine Ujang ak Jilan & Ors [1997] MLJU 63; [1997] 1 LNS 502, HC (refd)

Edmund Stanley Jugol ak Benedict Sandin v Datuk Peter Nyarok ak Entrie (unreported) [SG] (refd)

Kho Whai Phiaw v Chong Chieng Jen [2009] 4 MLJ 776; [2009] 3 CLJ 201, FC (refd)

Khoo Kay Por v v Ooi Ean Kwong & Anor [1980] 1 MLJ 92 (refd)

Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors [2009] 3 MLJ 589, FC (refd)

Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors [2010] 6 MLJ 363; [2010] 8 CLJ 608, HC (refd)

Wong Hua Seh v Ding Kuong Hiing [2009] 2 MLJ 325; [2009] 3 CLJ 475, FC (refd)

Legislation referred to

Election Offences Act 1954 ss 4A , 8, 11, 11(1)(b), (d), 32, 32(a), (c), 36

Election Petition Rules 1954 rr 4(1)(b), (2), 4(4), 4(4)(3), 5

Rules of Court 2012 O 18 r 19(1)(a)

Izzat Muhtar (Izzat Muhtar & Hudha) for the petitioner.

Gobind Singh Deo (Joane Chua Tsu Fae with him) (Thomas Philip) for the respondent.

Suraya Othman J:

[1] A general election was held on the 5 May 2013 ('the said election'). The petitioner stood as a candidate under the *Barisan Nasional* ('BN') for the State Seat/Constituency of *Dewan Undangan Negeri* ('DUN') N23 Penggaram

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Johor against the Democratic Action Party's ('DAP') candidate Gan Peck Cheng and lost in the election. The DAP candidate won by a majority of 10,051 votes and was declared duly elected.

[2] The petitioner filed an election petition dated 10 June 2013 ('the petition') in court challenging the result of the election alleging non-compliance or offences being commited by the respondent or his agent under s 8 (an offence of treating) to be read together with ss 32(c) and 4A (offence of promoting feelings of ill-will, discontent or hostility) to be read together with s 11(1)(d) (by publishing any false statement of fact in relation to the personal character or conduct of any candidate) and s 32(c) of the Election Offences Act 1954 (Act 5) ('the EO Act'). Section 32(c) is a section to declare the election void on account that a corrupt or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate. Thus, due to these non-compliance and offences being commited, the petitioner prayed for a declaration that (a) the election is void; (b) that the respondent was not duly elected; (c) a determination and consequential orders under s 36 of the EO Act; (d) any such further orders or reliefs the court deems fit and (e) costs of the petition.

[3] The election petition filed by the petitioner is produced below:

DALAM MAHKAMAH TINGGI MALAYA DI MUAR
DALAM NEGERI JOHOR DARUL TAKZIM
PETISYEN PILIHAN RAYA NO: 26PP-2-06/2013

Dalam Perkara Seksyen 8, 4A, 11 (1) (d) 34 (b) dan Seksyen 32(c) Akta Kesalahan Pilihan Raya 1954
DAN
Dalam Perkara Akta Pilihan Raya 1958(Akta19)
DAN
Dalam Perkara Akta Kesalahan Pilihan Raya 1954
DAN
Dalam Perkara Artikel 118 dan 119 Perlembagaan Persekutuan Malaysia
DAN
Dalam Perkara Kaedah-Kaedah Petisyen Pilihan Raya 1954
DAN
Dalam Kaedah-Kaedah Mahkamah 2012
DAN

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Dalam Perkara Pilihan Raya bagi Bahagian Pilihan Raya Dewan Undangan Negeri N.23 Penggaram, Johor yang diadakan pada 05/05/2013.

Dl ANTARA

KING BAN SIANG — PEMPETISYEN
Beralamat di:
No. 37 Jalan Meribut, Taman Nira, 83000 Batu Pahat, Johor.

DAN

GAN PECK CHENG — RESPONDEN
Beralamat di:
Jalan Keruing, Taman Batu Pahat, 83000 Batu Pahat, Johor.

AKTA KESALAHAN PILIHAN RAYA 1954
PILIHAN RAYA BAGI KAWASAN DEWAN UNDANGAN NEGERI N.23 PENGGARAM JOHOR YANG DIADAKAN PADA 5HB. MEI 2013

PETISYEN PILIHAN RAYA

PETISYEN KING BAN SIANG (NO K/P 800703-01-6013) yang beralamat di No 37 Jalan Meribut, Taman Nira, 83000 Batu Pahat, Johor Darul Takzim yang ditandatangannya terdapat di bawah ini.

1. Pempetisyen kamu ialah seorang calon Barisan Nasional yang mendakwa sebagai yang ada hak untuk dilapor pilih atau dipilih di dalam Pilihan raya Umum yang telah diadakan pada 5 Mei 2013 (selepas ini dirujuk sebagai pilihan raya tersebut) di Bahagian Dewan Undangan Negeri N 23 Penggaram, Johor (selepas ini dirujuk sebagai bahagian pilihan raya tersebut) dan adalah merupakan seorang yang layak untuk mengemukakan petisyen ini dibawah Seksyen 34(b) Akta Kesalahan Pilihan Raya 1954.

2. Pempetisyen menyatakan bahawa pilihan raya tersebut diadakan pada 5 Mei 2013 (selepas ini dirujuk sebagai Hari Mengundi) di mana pempetisyen dan Gan Peck Cheng sebagai calon Democratic Action Party (DAP), responden, adalah merupakan calon-calon untuk kerusi Dewan Undangan Negeri N 23 Penggaram, Johor dan Pegawai Pengurus Pilihan Raya telah melapor pilih responden sebagai dipilih dengan sempurnanya.

3. Mengikut Warta Kerajaan P.U. (B) 236 bertarikh 22/05/2013 keputusan pilihan raya bagi bahagian pilihan raya tersebut adalah seperti berikut:

BAHAGIAN PILIHAN RAYA N 23 PENGGARAM

A. Jumlah pemilih 45,157

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B.	Jumlah kertas undi yang dikeluarkan dalam Pengundian (seperti di A dalam semua Borang 14 + A dalam Borang 15)	39,408
C.	Bilangan undian oleh pemilih bagi setiap calon yang bertanding:	
	1. KING BAN SIANG BN	14,226
	2. GAN PECK CHENG DAP	24,277
D.	Jumlah kertas undi yang ditolak	834
E.	Bilangan kertas undi yang dikeluarkan tetapi tidak dimasukkan ke dalam peti undi	69
F.	Peratus pengundian (B/A x 100)	87.30%
G.	Majoriti	10,051

4. Responden Gan Peck Cheng yang merupakan calon DAP telah memperolehi majority undi sebanyak 10,051 undi dan telah diisytiharkan dan dilapor pilih dengan sempurnanya dan keputusan pilihan raya tersebut telah diwartakan di abwah rujukan P.U. (b) 236 bertarikh 22/05/2013.

5. Pempetisyen kamu menyatakan bahawa:

(1) KEMUNGKIRAN, KESALAHAN DAN KEGAGALAN UNTUK MEMATUHI PERUNTUKAN SEKSYEN 8 DAN DIBACA BERSAMA SEKSYEN 32(c) AKTA KESALAHAN PILIHAN RAYA 1954.

FAKTA

Bahawa responden selepas pilihan raya pada 18/05/2013 jam di antara 8.15 malam hingga 10.45 malam di satu tanah lapang bersebelahan surat di Taman Sri Penggaram, Batu Pahat, Johor, sebagai calon Parti PKR bagi bahagian dalam Pilihan Raya N23 Penggaram yang telah membawa kemenangan kepada responden pada Pilihan Raya Umum tersebut sebagai imbuhan atau balasan mengundi atau tidak mengundi responden tersebut, oleh itu telahpun melakukan perbuatan rasuah dan menyalahi undang-undang dalam bentuk penjamuan makanan dan minuman di bawah s 8 yang dibaca bersama s 32(c) Akta Kesalahan Pilihanraya 1954.

6. Antara pengundi-pengundi yang telah hadir pada penjamuan makanan dan minuman tersebut diatas adalah seperti berikut:

No.	Nama	No. K/Pengenalan	Nombor Bilangan Daftar Pemilih
i.	Khairul Na'im bin Abd Latip	861108-56-6079	1793
ii.	Shamsudin bin Basar	661002-01-5029	1679
iii.	Roslan bin Saat	660720-01-5803	1425

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A BUTIRAN

7.
Responden telah bertanding sebagai calon DAP di bahagian Pilihan Raya N23 DUN Penggaram.

B 8.
Responden dan atau ejen-ejen dan atau pengkhidmat-pengkhidmat telah memaparkan pada atau sebelum 18/05/2013 kain rentang yang jelas menjemput pengundi dalam bahagian Pilihan Raya N23 DUN Penggaram yang tertera perkataan 'Jamuan Rakyat PRU 13' beserta
C gambar responden.

9.
Antara lokasi paparan kain rentang tersebut adalah di persimpangan Jalan Rahmat/Jalan Ampuan dan simpang Jalan Md Akil/Jalan Mustafa, Batu Pahat dalam bahagian Pilihan Raya N.23 Penggaram.

D 10.
Seterusnya pada tarikh 18/05/2013 jam di antara 8.15 malam hingga 11.00 malam responden telah dengan jelas dan nyata hadir dan meraikan pengundi dalam bahagian Pilihan Raya N.23 Penggaram.

E 11.
Majlis penjamuan makanan dan minuman tersebut telah dianjurkan oleh responden dan atau ejen-ejen dan atau pengkhidmat-pengkhidmatnya.

12.
Perbuatan penjamuan makanan dan minuman tersebut telah dilakukan di
F satu kawasan tanah lapang di Taman Sri Penggaram, Batu Pahat, Johor.

13.
Seramai lebih daripada 2000 orang pengundi telah menghadiri majlis tersebut dan telah turut dihadiri oleh responden.

G 14.
Responden juga telah membuat ucapan umum dalam majlis penjamuan tersebut. Ucapan tersebut telah menyentuh tentang pilihan raya umum ke 13 dan juga ucapan terima kasih kepada pengundi kerana telah mengundi dan memilih responden sebagai Ahli Dewan Undangan Negeri N 23
H Penggaram.

15.
Responden telah memuatnaik melalui akaun twitter responden berkaitan perbuatan penjamuan makanan dan minuman dengan nyata dan tanpa berselindung menghargai kehadiran pengundi yang begitu ramai telah
I menguatkan lagi bukti pempetisyen terhadap kesalahan, kemungkiran dan ketidakpatuhan responden terhadap peruntukan di bawah s 8 dan 32(c) Akta Kesalahan Pilihan Raya 1954.

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ALASAN-ALASAN

16.

Berdasarkan kepada fakta dan undnag-undang yang telah dinyatakan dalam petisyen ini, responden telah dengan jelas dan nyata melakukan sesuatu *perbuatan rasuah* yang menyalahi undang-undang berhubung *dengan pilihan raya itu dengan pengetahuan responden atau persetujuan responden atau oleh seseorang ejen responden*.

17.

Responden dan/atau ejen-ejen dan/atau pengkhidmat-pengkhidmat telah melakukan rasuah melalui perbuatan penjamuan makanan dan minuman untuk memberi imbuhan dan memberi balasan terhadap undi yang diberi oleh pengundi selepas pilihan raya dalam tempoh yang tidak dibenarkan dalam Akta Kesalahan Pilihan Raya 1954.

18.

Seksyen 32(c) hanya memerlukan berlakunya atau terjadinya sesuatu perbuatan rasuah penjamuan yang dilakukan oleh responden atau dilakukan oleh orang lain atau ejen responden dengan pengetahuan atau persetujuan responden.

19.

Tidak ada sebarang keperluan atau kemestian yang diperuntukkan di dalam s 8 dan s 32(c) bahawa perbuatan rasuah tersebut hendaklah dilakukan terhadap penduduk ataupun pengundi. Inti patinya adalah perbuatan rasuah penjamuan telahpun dilakukan oleh responden ataupun telahpun berlaku dengan pengetahuan atau persetujuan responden.

20.

Oleh yang demikian pempetisyen kamu menyatakan bahawa fakta rasuah penjamuan yang dibuat oleh responden dan/ejen-ejen dan/atau pengkhidmat-pengkhidmat amat jelas untuk menyatakan bahawa responden melakukan *kemungkiran di bawah s 8 dan dibaca bersama s 32(c)*.

(2) KEMUNGKIRAN, KESALAHAN DAN KEGAGALAN UNTUK MEMATUHI PERUNTUKAN SEKSYEN 4A DAN DIBACA BERSAMA SEKSYEN 11(1)(d) DAN SEKSYEN 32(c) AKTA KESALAHAN PILIHAN RAYA 1954.

KAIN RENTANG 'UBAH SEKARANG BERSIHKAN MALAYSIA'

FAKTA

Bahawa responden dan atau ejen-ejen dan atau pengkhidmat- pengkhidmatnya pada 22/04/2013 jam 10.05 pagi hingga 07/05/2013 jam 11.45 pagi di tepi pagar Sekolah Menengah Tinggi Batu Pahat di Jalan Zahrah batu Pahat, Johor bagi bahagian Dewan Undangan Negeri N.23 Penggaram, telah melakukan perbuatan dengan tujuan mengembangkan perasaan jahat dan tidak puas hati antara kaum

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yang sama dan berlainan dengan, mengedarkan atau memaparkan atau menampalkan sebuah kain rentang yang mengandungi perkataan 'Ubah Sekarang Bersihkan Malaysia' di bahagian N.23 DUN Penggaram yang telah membawa kemenangan kepada responden pada pilihan raya umum tersebut, oleh itu telahpun melakukan perbuatan yang menyalahi undang-undang dan rasuah di bawah s 4A yang dibaca bersama s 11(1)(d) dan 32(c) Akta Kesalahan Pilihanraya 1954.

BUTIRAN

. Responden telah bertanding sebagai calon DAP di bahagian pilihan raya N. 23 DUN Penggaram.

. Keputusan Pilihan Raya Umum ke-13 telah diwartakan pada 22/05/2013 di bawah P.U.(B) 236 dan responden telah diisytiharkan sebagai pemenang.

. Responden dan atau ejen-ejen dan atau pengkhidmat- pengkhidmatnya tela mengedarkan dan atau menampalkan dan atau memaparkan kain rentang yang jelas mempunyai tulisan dalam Bahasa Malaysia tertera perkataan 'Ubah Sekarang Bersikan Malaysia' beserta gambar responden. (selepas ini dirujuk sebagai kain rentang tersebut).

. Antara lokasi paparan kain rentang tersebut adalah ditepi pagar Sekolah Menengah Tinggi Batu Pahat di Jalan Zahrah Batu Pahat, Johor (selepas ini dirujuk sebagai lokasi tersebut).

. Kain rentang tersebut telah diedarkan dan atau ditampalkan dan atau ditampalkan bermula dari tarikh 22 April 2013 hingga ke tarikh 7 Mei 2013.

. Kain rentang tersebut diedarkan dan atau dipaparkan dan atau ditampalkan oleh responden dan ejen-ejen dan atau pengkhidmat-pengkhidmatnya di lokasi tersebut yang merupakan tempat laluan utama kenderaan persendirian dan awam atau lokasi strategik dan tumpuan utama pengundi DUN N. 23 Penggaram serta merupakan sebuah tempat mengundi bagi Pusat Daerah mengundi Taman Soga.

. Responden sememangnya telah mempunyai pengetahuan tentang kewujudan kain rentang tersebut kerana telah dan amat biasa melalui jalan dan atau lokasi tersebut semasa responden berkempen di DUN N. 23 Penggaram.

. Seterusnys pada tarikh 22/04/2013 jam diantara 10 malam hingga 11 malam ejen pempetisyen telah membuat pengaduan kepada PPKKPR

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namun responden dan atau ejen-ejen dan atau pengkhidmat-pengkhidmatnya masih gagal, enggan dan abai untuk menurunkan kain rentang tersebut.

.

Kain rentang tersebut telah diedarkan dan ditampalkan oleh responden dengan tujuan untuk menimbulkan dan mengembangkan perasaan jahat dan tidak puas hati antara kaum yang sama atau kaum yang berlainan bagi penduduk dan atau pengundi DUN N. 23 Penggaram.

ALASAN-ALASAN

Alasan-alasan ketidakpatuhan undang-undang dan atau perlanggaran-perlanggaran adalah seperti berikut:

.

Inti pati penting didalam s 4A(1) Akta Kesalahan Pilihan Raya 1954 adalah seperti berikut: sebelum, semasa atau selepas sesuatu pilihan raya, secara langsung atau tidak langsung, dengan sendiri atau melalui mana-mana orang lain bagi pihaknya, melakukan perbuatan atau pernyataan dengan tujuan untuk megembangkan perasan jahat, tidak puas hati atau permusuhan antara kaum yang sama atau kaum yang berlainan

.

Perbuatan responden dan atau ejen-ejen dan atau pengkhidmat-pengkhidmatnya yang mengedar dan atau memaparkan dan atau menampalkan kain rentang tersebut secara langsung atau tidak bertujuan untuk mengembangkan perasan jahat, tidak puas hati atau permusuhan.

.

Perkataan 'Ubah Sekarang Bersihkan Malaysia' adalah perkataan yang jelas mempunyai unsur, niat dan kecenderungan untuk mengembangkan perasaan jahat, tidak puas hati dan permusuhan antara penduduk dan atau penggundi di DUN N.23 Penggaram terhadap Kerajaan Malaysia dan khasnya kepada pempetisyen sebagai calon Barisan Nasional di DUN yang sama.

.

Pempetisyen kamu menyatakan bahawa 'Bersihkan Malaysia' bermaksud membersihkan Kerajaan Malaysia yang dipimpin oleh parti Barisan Nasional yang kotor kerana mengamalkan rasuah dan tidak cekap.

.

Pempetisyen kamu menyatakan juga bahawa 'Bersihkan Malaysia' bukan sahaja mengembangkan perasan jahat, tidak puas hati dan permusuhan antara rakyat dan kerajaan, malah ia juga turut ditujukan kepada watak, kelakuan dan peribadi calon iaitu pempetisyen yang bertanding di atas tiket BN dan dengan itu pempetisyen juga telah dikatakan melakukan perbuatan rasuah sepertimana pemimpin dalam kerajaan BN dan perkara

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kemungkiran ini adalah satu bentuk perbuatan rasuah atau perbuatan yang menyalahi undang-undang di bawah s 4A dan turut dibaca bersama di bawah s 11(1)(d) dan 32(c).

.

Responden dan atau ejen-ejen dan atau pengkhidmat-pengkhidmatnya telah mengedarkan dan atau mempamerkan dan atau menampalkan kain rentang tersebut adalah bertujuan untuk mendorong mana-mana pemilih atau pengundi supaya mengundi responden atau tidak mengundi pempetisyen semasa hari mengundi bertarikh 5/05/2013.

.

Berdasarkan kepada alasan-alasan di atas pempetisyen menyatakan bahawa sesuatu perbuatan rasuah atau perbuatan yang menyalahi undang-undang telah dilakukan berhubung dengan pilihan raya itu oleh responden atau setahu atau persetujuan responden, atau oleh seseorang ejen dan atau pengkhidmat responden dan dengan itu pilihan raya DUN N. 23 Penggaram itu tidak sah.

KEMUNGKIRAN SECARA KUMULATIF

Selanjutnya dan/atau secara altematif kepada apa yang tersebut diatas, pempetisyen menyatakan kemungkiran-kemungkiran dan juga ketidakpatuhan-ketidakpatuhan yang dilakukan oleh responden yang secara kumulatifnya dan berleluasa telah menyentuh keputusan pilihan raya itu selaras dengan s 32(c) Akta Kesalahan Pilihan Raya 1954.

OLEH ITU pempetisyen kamu memohon kepada mahkamah yang mulia ini:

1. Sesuatu perisytiharan bahawa pilihanraya itu tidak sah dan terbatal;
2. Satu pengisytiharan bahawa responden telah tidak dipilih atau dilapor pilih dengan sewajarnya;
3. Satu pengisytiharan bahawa pengesahan dan arahan-arahan di bawah peruntukan s 36 Akta Kesalahan Pilihan Raya 1954;
4. Apa-apa perintah atau relif yang disifatkan adil dan saksama untuk diberikan oleh mahkamah yang mulia; dan
5. Kos bagi petisyen ini.

NOTICE OF PRELIMINARY OBJECTION

[4] The respondent through his solicitor, Messrs Thomas Phillip, then gave notice of preliminary objections ('the PO') to the election petition by a letter dated 8 July 2013, praying for an order that the petition be struck out with costs for non-compliance with r 4(1)(b), 4(2) and 4(4) of the Election Petition Rules 1954 ('the EP Rules') and due to the petitioner's failure to plead s 11 in connection with his reliance on s 32 of the EO Act for a declaration that the election be declared void due to the commission of a corrupt or illegal practice by the candidate or his agent. The PO is produced below:

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THOMAS PHILIP
ADVOCATES & SOLICITORS

Litigation Arbitration Mediation

Our Ref : 10.2696
Your Ref

8th July 2013

Syed Faisal Al-Edros B. Syed Abdullah
and Izzat Bin Muhtar
Advocates for the Petitioner, King Ban Siang
c/o M/s Izzat Muhtar Hudha
No. 26-01, Jalan Setia Tropika 1/29
Setia Tropika
81200 Johor Bahru.

By Fax & Courier
(07-236 7879)

Dear Sirs,

In the High Court of Muar
Election Petition No: 26PP-2-06/2013
King Ban Siang **Pempetisyen**
Gan Peck Cheng **Responden**

We act for the respondent.

2. We refer to the directions by the Learned Judge, Dato' Suraya Binti Othman on 3.07.2013.

3. **Please take note** that the respondent intends to raise preliminary objections to the Election Petition ('Petition') and to pray for an order that the petition be struck out with costs on the following grounds:

3.1. Non-compliance with rules 4(1)(b), 4(2) and 4(4) of the Election petition Rules 1954:

(a) In relation to paragraphs 5 and 6 of the petition, there are no concise facts pleaded on which the petitioner may rely on to sustain the prayers;

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(b) In relation to paragraphs 7 to 15 of the petition, there are insufficient particulars pleaded to present a full picture of the cause of action on which the petitioner may rely on to sustain the prayers;

(c) The facts and particulars as pleaded do not co-relate or have sufficient nexus with each other;

(d) In relation to paragraphs 16 to 20 of the petition, there are no concise grounds pleaded on which the petitioner may rely on to sustain the prayers;

(e) In relation to pages 7 to 11 of the petition, the petitioner has failed to confine each paragraph to a distinct portion of the subject;

(f) In relation to pages 7 to 11 of the petition, the petitioner has failed to number the paragraphs consecutively;

(g) In relation to pages 7 and 8 of the petition, there are no concise facts pleaded on which the petitioner may rely on to sustain the prayers;

(h) In relation to pages 8 and 9 of the petition, there are insufficient particulars pleaded to present a full picture of the cause of action on which the petitioner may rely on to sustain the prayers;

(i) The facts and particulars as pleaded do not co-relate or have sufficient nexus with each other;

(j) In relation to pages 9 and 10 of the petition, there are no concise grounds pleaded on which the petitioner may rely on to sustain the prayers.

4. In relation to the petitioner's reliance on section 32(c) of the Election Offences Act 1954, the petitioner has failed to plead section 11 of the Election Offences Act 1954.

Yours faithfully,

For the Advocates of the Respondent

tt.

Joanne Chua Tsu Fae Associate

GROUNDS OF THE ELECTION PETITION

[5] As stated before, the election petition is filed to declare the election void under s 32(c) due to the commission of a corrupt or illegal practice by the candidate or his agent, or with his knowledge or consent. The petitioner alleged that the respondent commited the offence of treating under s 8 of the EO Act by providing food and drinks on 18 May 2013 to the voters of N23 Penggaram

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for the purpose of corruptly influencing the voters to vote or refrain from voting and thus the the election should be declared void under s 32(c) due to corruption. The second allegation pertains to s 11(1)(d) for publishing false statement of fact in relation to the personal character or conduct of a candidate which affected the return of the candidate. This is by way of putting up banners which contains the words 'Ubah Sekarang Bersihkan Malaysia' (*Change Now Clean Up Malaysia*) in the vicinity of N23 Penggaram and in doing so the respondent had commited the offence under s 4A of promoting ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia which resulted in the respondent winning the election. On these two allegations, the petitioner filed the PO which is premised on the following grounds:

(a) non-compliance with r 4(1) (b), 4(2) and 4(4) of the Election Petition Rules 1954 (particulars whereof as stated in the said letter in paras 3.1(a) – (j)); and

(b) in relation to the petitioner's reliance on s 32(c) of the Election Offences Act 1954, the petitioner has failed to plead s 11 of the Election Offences Act 1954.

THE RESPONDENT'S SUBMISSION

[6] The respondent's counsels, Mr Gobind Singh Deo assisted by Miss Joane Chua Tsu Fae, inter alia, submitted that:

(a)

there was failure to plead s 11(1)(d);

The petitioner at paras 5–20 of the petition complains that the respondent has breached s 8 of the EO Act resulting in which, the respondent has committed an offence under s 32(c) thereof. The complaint here is materially defective in that no reference is made to s 11 of the said Act. Reference is made to the judgment of the Federal Court in *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201 wherein it was held, to make good a charge under s 32(c) of the Act which concerns corrupt practice, s 11 of the Act was a mandatory requirement to provide the essential connecting link to constitute a cause of action, the failure of which renders the charge defective and incomplete.

The petition in this case makes no reference to s 11 of the Act at all. This is clearly against r 4 of the EP Rules. On this ground alone, the complaint against the respondent on an offence under s 32(c) read with s 8 of the EO Act cannot succeed,

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(b)

lack of facts and particulars to bring home the offence of treating;

Counsel submitted that the petitioner has failed to plead those facts and circumstances as necessary to make out a case of treating under s 8 of the said Act. The respondent submitted that there was no evidence that the food was provided to influence the voting. The mere fact that food and drinks were provided do not give rise to any inference that it was corruptly given to influence voting. Therefore, the petitioner failed to establish the offence of treating under s 8(c).

The respondent further submitted that the petition did not give any details At para 6 of the petition, the petitioner named three persons merely as persons who attended the said dinner. This is insufficient. Further, a careful study of paras 7–20 of the petition would reveal no reference being made at all to the three named electors or how it is alleged that they were influenced by the respondent. It is therefore clear that the petitioner has failed to provide sufficient facts or particulars of corrupt practice which brings the petition within s 32(c) of the Act.

Further, the petitioner has failed to show that there was a bargain struck.The petition did not plead or alleged that there was a promise and a counter-promise by any of the identified voters to vote for the respondent, whether before or after the said election,

(c)

the petitioner has failed to plead facts or circumstances which support a case under s 4A of the said Act;

Counsel referred to para B of p 9 of the petition. This paragraph Mr Gobind Singh Deo submitted does not speak of race or class as required under s 4A of the Act.

He further made references to paras C – E of p 10 which again does not speak of race or class as required under s 4A of the Act.

Thus Mr Gobind Singh Deo argued that the petitioner has clearly misconstrued s 4A of the Act in that the complaints therein essentially relate to feelings of ill-will, discontent or hostility between citizens and 'Kerajaan Malaysia' and the petitioner as a candidate for *Barisan Nasional* in the state constituency. These are matters which clearly do not come within s 4A of the Act, and

(d)

non-compliance with r 4(2) of the Rules;

Counsel submitted that:

(i) in relation to pp 7–11 of the petition, the petitioner has failed to

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confine each paragraph to a distinct portion of the subject; and

(ii) in relation to pp 7–11 of the petition, the petitioner has failed to number the paragraphs consecutively.

Thus the respondent submitted that the petition is bad in law and as such, should be struck out with costs.

THE PETITIONER'S SUBMISSION

[7] The petitioner is represented by Mr Izzat Muhtar who submitted, inter alia:

(a) that in an objection made by way of a letter (as in this case), the respondent is only allowed to state the points of law and not the facts that they are relying on;

(b) in the said letter, the respondent had failed to specify the provisions under which rule of the Rules of Court 2012 that the respondent are moving the honourable court to hear the objections. Hence the entire objection is void and defective;

(c) in the alternative, if the respondent is relying on O 18 r 19(1)(a) of the Rules of Court 2012 to move this court, then it is submitted that such recourse for summary process, would only be entertained by the court if 'on the face of it it is obviously unsustainable' (*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7);

(d) Mr Izzat Muhtar submitted that in Election Petition No 26–01 of 2006–01 (SG) *Edmund Stanley Jugol ak Benedict Sandin v Datuk Peter Nyarok ak Entrie* it was held that in relation to r 4(1)(b) of the EP Rules, the rule does not require particulars to be given. The High Court continued to state that the details sought were in effect a matter of evidence in relation the specific question;

(e) further, r 5 of the EP Rules expressly states that evidence need not be stated in the petition but particulars may be ordered upon application. However, the respondent has never sought any particulars whatsoever of this petition;

(f) he argued that O 18 r 7 of the Rules of Court 2012 expressly states that pleadings must contain only a statement in a summary form of the material fact on which the party pleading relies for his claim but not the evidence by which those facts are to be proved;

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(g) Mr Izzat Muhtar states that the basis of the plea of corrupt practices had been pleaded and evidence will be adduced during trial. Therefore, the proof of whether corrupt practices had occurred is a question of evidence;

(h) he referred to the case of *Chiew Chiu Sing v Datuk Celestine Ujang ak Jilan & Ors* [1997] MLJU 63; [1997] 1 LNS 502 which clearly spells out the difference between form and substance when it is stated 'An Election Court does distinguish between form and substance' and in *Abdul Karim v Mohamed Taib & Anor* [1969] 2 MLJ 72 and *Khoo Kay Por v Ooi Ean Kwong & Anor* [1980] 1 MLJ 92 'while Election petition now before me may have inadequacies as to form, it is adequate as to substance read in totality' to support his contention;

(i) He further argued that in the case of *Abd Hamed bin Mamat lwn Uz Baharuddin bin Mohd dan lain-lain* [1992] MLJU 83; [1993] 1 AMR 1 the High Court held that ' Justeru itu mahkamah ini berpendapat bahawa tidaklah perlu pihak pempetisyen membuktikan bahawa ketidakpatuhan itu menyentuhi keputusan pilihan raya asalkan ianya membuktikan bahawa ketidakpatuhan itu nampaknya adalah suatu ketidakpatuhan yang menunjukkan bahawa pilihan raya telah dijalankan tidak mengikut prinsip-prinsip perundangan pilihan raya'.

[8] Therefore Mr Izzat Muhtar submitted that the PO by the respondent is wholly misconceived and without merit and should be dismissed with costs.

THE DECISION OF THE COURT

[9] Upon reading the relevant cause papers and upon considering the submissions of counsel for both the petitioner and the respondent, I am of the view that this petition ought to be struck out on the following grounds.

THE LAW

[10] An election court is vested with the power to strike out or otherwise dispose of an election petition by way of a striking out application or a preliminary objection (*Mohd Zaid bin Ibrahim v P Kamalanathan a/l P Panchanathan & Ors* [2010] 6 MLJ 363; [2010] 8 CLJ 608).

Section 32(c) of the Election Offences Act 1954 (Act 5) states as follows:

> The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election Judge:
>
> > (c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate,

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[11] In *Mohd Nazri bin Hj Din v Dato' Seri Raja Ahmad Zainuddin bin Raja Hj Omar & Ors* [2009] 3 MLJ 589, the Federal Court held that in order to sustain an election petition under s 32(a) or (c) of the EO Act, the material facts to be pleaded as required by r 4 of the EP Rules 1954, would be the elements that constitute the offence of bribery (in our instant case corruption).

[12] In this regard, r 4(1)(b) of the EP Rules states as follows:

> election petition *shall* contain the following statements: (b) *shall state the holding and result of the election, and shall briefly state the facts and grounds relied on to sustain the prayer.* (Emphasis added.)

[13] The Federal Court in *Mohd Nazri*, at p 590 held:

> The use of the *word 'shall' in the rules means that the requirements of the two rules are mandatory.* The extent to which the facts and grounds relied upon must be set out in a petition is explained by the use of the words 'briefly' in r 4(1)(b) and 'concise' in r 4(4)(3). (Emphasis added.)

[14] The word 'briefly' is the adverb of 'brief' which is defined in *Webster's New World Dictionary* as, inter alia:

> A concise statement of the main points of a law case, usually filed by counsel for the information of the court.

[15] And the word 'concise' as:

> brief and to the point; short and clear. Concise implies the stating of much in few words, by removing all superfluous or expanded details.

[16] Further the case held:

> The scope and width of these two words must be read with the requirement of r 4(1)(b) that the facts and grounds relied on must be such as to ' sustain the prayer' on which the petitioners rely' as stipulated in r 4(4)(3). *A prayer can be sustained only by a statement of the facts necessary to establish it they will be the facts on which a petitioner will rely. Thus there must be sufficient facts to constitute a cause of action as they will form the basis of the prayer. It is therefore abundantly clear that the facts to be pleaded pursuant to r 4(1)(b) and 4(4)(3) must be such as to make out a case for the petitioner.* In other words all the material facts must be pleaded though a concise statement of them will suffice. *Failure to comply with this mandatory requirement will render the petition defective* (see *Gan Joon Zin v Fong Kui Lun & Ors* [2004] 4 CLJ 729). The facts that must be pleaded will depend on the election offence alleged to have been committed and the elements that are required to be established in respect of it. (Emphasis added.)

[17] In the case of *Mohd Zaid Ibrahim*, the election judge, His Lordship, Azhar Mohamed J, (as he then was), went further to state that the requirements

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of r 4 are mandatory and His Lordship said as follows:

> It is at this stage that I pause here for a moment to underline the significance of the mandatory requirement. It may seem at first sight a hard result for any petitioner in any election petition. Why is this? The first thing that one should know and clearly understand is that *the jurisdiction of the election judge to hear election petition is a creature of statute and the judge is especially bound strictly within the letters of the election laws* (see *Mahari bin Endut v Dato' Hj Mat Razali bin Kassim & Ors* [2009] 5 MLJ 153). In the same vein, just as the election court is bound by the election laws, so *too the petitioner in any election petition must strictly adhere to and obey all the requirements of the election laws.* And in this regard, even in the area of public law litigation, the audi alteram partem rule, or the rule requiring fair hearing is of central importance. A basic norm of natural justice is that before initiating adjudicatory proceedings, the party concerned should be given notice of the case against him so as to enable him to adequately defend himself. The right to a hearing becomes illusory if the party has no sufficient and full knowledge of the precise allegations which he has to meet. Notice is thus regarded as the sine qua non of the right of hearing (see *Administrative Law of Malaysia and Singapore* (3rd Ed), by Professor MP Jain at p 291). Over and above this, there is a greater reason for taking the same view in regard to matters pertaining to the allegations of corrupt practice in an election petition. (Emphasis added.)

[18] The first charge or complaint that an offence of treating 2,000 voters on 18 May 2013 to food and drinks from 8.15–10.45pm under s 8 for the purpose of corruptly influencing them to vote or refrain from voting to be read together with s 32(c) of the EO Act.

[19] Section 8 states:

> Treating
>
> 8 *Every person who, corruptly*, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides or causes to be given or provided, or is accessory to the giving or providing, or pays or engages to pay wholly or in part, the expense of giving or *providing any food, drink, refreshment* or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person *for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at such election* or on account of any such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election, and every elector or voter who corruptly accepts or takes any such food, drink, or refrasment or provision or any such money or ticket or who adopts such other means or device to enable the procuring of such food, drink, refreshment or provision *shall be guilty of the offence of treating*. (Emphasis added.)

[20] Section 32(c) states:

> Avoidance of election on election petition

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32 *The election of a candidate at any election shall be declared to be void* on an election petition on any of the following grounds only which may be proved to the satisfaction of the Election judge:

(a)

(b)

(c) *that a corrupt practice or illegal was commited in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate.* (Emphasis added.)

[21] Section 11(1) (b) states:

Punishment and incapacities for corrupt practice

11(1) Every person who –

(a)

(b) *commits the offence of treating, undue influence or bribery; shall be guilty of a corrupt practice*, and shall, on conviction by a Sessions Court, be liable, in the case referred to in paragraphs (a) to (b), to imprisonment for a term not exceeding 2 years and to a fine of not less than one thousand ringgit and not more than five thousand ringgit. (Emphasis added.)

[22] The first charge or complaint by the petitioner that the respondent has breached s 8 (treating) of the EO Act 1954 and as such the election should be declared void due to the commission of a corrupt practice under s 32(c) thereof is fundamentally defective. This is so since the petitioner had failed to plead s 11(1)(b) of the said Act with regard to this charge/complaint.

[23] To make good a charge under s 32(c) which concerns corrupt or illegal practice, s 11(1)(b) is therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action. In the case of *Kho Whai Phiaw v Chong Chieng Jen* [2009] 4 MLJ 776; [2009] 3 CLJ 201, the Federal Court (Putrajaya) held at p 787 (MLJ); at p 211 (CLJ).

The EJ was absolutely right to hold that the charges were fundamentally defective and that they should be dismissed on that ground alone. While ss 9(1) and 10(a) of the Act define the offences of undue influence and bribery respectively, it is s 11(1)(b) of the Act that makes those two offences an offence of corrupt practice. Without the reliance on s 11 of the Act which makes bribery an offence of corrupt practice, there is an essential missing link between ss 10(a) and 32(c) of the Act because s 10(a) merely defines what is bribery, and it is s 32(c) which enacts corrupt practice as a ground to avoid the election. *To make a good charge under s 32(c) of the Act which concerns corrupt practice, s 11 of the Act is therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action.* (Emphasis added.)

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[24] In the present, the petitioner however failed to do so.

[25] As stated earlier, the petitioner's failure to plead s 11(1)(b) of the Election Offences Act 1954 renders all the charges/complaints specified in the election petition fundamentally defective.This is so since without the reliance of s 11(1)(b) of the Act which makes treating an offence of corrupt practice, there is an essential missing link between s 8 of the Act which merely defines what is treating, and s 32(c) which enacts corrupt practice as a ground to avoid the election. To make good a charge under s 32(c) of the Act which concerns corrupt practice, s 11(1)(b) of the Act is therefore a mandatory requirement to provide the essential connecting link to constitute the cause of action. *And in the circumstances of failure to do so, the charges/complaints should be dismissed on that ground alone.*

[26] *With regard to the second preliminary objection ie non-compliance with r 4(1)(b), 4(2) and 4(4) of the EP Rules 1954* (particulars whereof as stated in the said letter in paras 3.1(a)–(j)), this court is of the view that the petition must contain the material facts and sufficient particulars of the complaints pursuant to r 4(1)(b) and 4(4)(3) of the EP Rules 1954.

[27] Rule 4 states:

> Contents and form of election petition
>
> 4 (1) An election petition shall contain the following statements:
>
> (a)
>
> (b)
> *it shall state the holding and result of the election,and shall briefly state the facts and grounds relied on to sustain the prayer.*
>
> (2)
> The petition shall be divided into paragraphs
>
> (3)
> The petition shall conclude with a prayer
>
> (4)
> The following form, or one of the like effect, shall be sufficient:
>
> (1)
>
> (2)
>
> (3) *And your petitioners say that (here state the concise facts and grounds on which the petitioner rely).* (Emphasis added.)

[28] *What it entails is that there must be sufficient facts to constitute a cause of action as they will form the basis of the prayer. The facts to be pleaded pursuant to*

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r 4(1)(b) and 4(4)(3) must be such as to make out a case for the petitioner. In other words, all the material facts must be pleaded though a concise statement of them will suffice. Failure to comply with this mandatory requirement will render the petition defective.

[29] In *Wong Hua Seh v Ding Kuong Hiing* [2009] 2 MLJ 325; [2009] 3 CLJ 475, the Federal Court observed as follows:

> It was not disputed that the luncheon was sponsored by TPK for some 500 people. We agree with the learned election judge that to prove treating under s 8 the appellant need to *establish beyond reasonable doubt that food was provided with the intention of influencing the voters to vote for a candidate or not to vote a candidate at an election.* (Emphasis added.)

[30] Reference is also made to the judgment of the High Court in that case in which His Lordship, Justice Ian Chin, held in respect of s 8 as follows:

> The allegation of treating was confined to 25 February luncheon gathering where evidence was led that TPK or his friends had paid for food for 500 people. Under s 8, it must be established that the food was given in order to influence the voters to vote for whom or whom not to vote. *The petitioner's counsel did not elaborate how the luncheon had reaped votes for the respondent which must be established* as said in *Schofield's Election Law*, Vol 1, Shaw & Sons (2nd Ed), (1996) referred to *Tewkesberry Law* [1857] 20 Dig 88, 677 and said (which I respectfully agree). (Emphasis added.)

[31] The Federal Court also observed that the learned election judge found as a fact that there was no such evidence before the court. Quoting from *Schofield's Election Law*, Vol 1, Shaw & Sons, (2nd Ed), (1996), which referred to *Tewkesberry Law* (1857) 20 Dig 88, at p 677 it is stated that:

> For to prove treating to be corrupt it is necessary to prove that some person has been thereby corrupted and *induced by such treating to vote for the sitting member.* (Emphasis added.)

[32] Now, let's scrutinise the petition to see whether these requirements have been complied with. In the present case, there was no explanation or elaboration in the petition as to how the 'treating' of the voters to food and drinks had reaped votes for the respondent as stated in *Schofield's Election Law*, Vol 1, Shaw & Sons (2nd Ed), (1996) which referred to *Tewkesberry Law* [1857] 20 Dig 88, at p 677.

[33] The respondent submitted that there was no evidence that the food was provided to influence the voting. This court agrees. The mere fact that food and drinks were provided do not give rise to any inference that it was corruptly given to influence voting. To succeed under s 8, the petitioner has to disclose in the petition that:

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(a) first, the *identity of persons* who are said to have been influenced by the respondent to vote for him on account of treating; and

(b) second, that *those identified persons were indeed influenced by the respondent and voted for him as a result of such treating*.

[34] It is to be observed that in the petition there are no details given by the petitioner regarding these matters.

[35] At para 6 of the petition, the petitioner named three persons merely as persons who attended the said dinner. This is inadequate. In our instant case, what is stated is merely their presence at the said dinner and nothing more. It must be noted that the petitioner lost by 10,051 votes to the respondent. This is a big majority.

[36] Further, a careful study of paras 7–20 of the petition would reveal no reference being made at all to the three named electors or how it is it is alleged that they were influenced by the respondent to vote for him on account of the treating. It is therefore clear that the petitioner has failed to provide sufficient facts or particulars of corrupt practice which brings the petition within ss 8, 11(1)(b) and 32(c) of the EO Act.

[37] *Thus the facts pleaded in respect of this complaint did not disclose the commission of an offence under ss 8 and 11(1)(b). The result is that they do not comply with the requirements of r 4(1)(b) and 4(4)(3) as the facts pleaded are insufficient to sustain the prayer.*

[38] Furthermore, as correctly pointed out by the respondent's counsels in their submission, the petition did not plead or show that there was a promise and a counter-promise by any of the identified voters to vote for the respondent, whether before or after the said election.

[39] *On the second charge/complaint under s 4A read together with ss 11(1)(d) and 32(c) of the EO Act; that of publishing any false statement of fact on the personal character or conduct of a candidate which action promote feelings of ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia in order to induce any voter to vote or refrain from voting at an election or to procure the election of any person*, this court finds that the preliminary objection raised by the respondent are as found in paras 3(e)–(j) of their letter dated 8 July 2013.

[40] Section 4A states:

Offence of promoting feelings of ill-will or hostility

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4A (1) *Any person* who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, does any act or *makes any statement with a view or with a tendency to promote feelings of ill-will, discontent or hostility between persons of the same race or different races ot of the same class or different classes of the population of Malaysia* in order to induce any elector or voter to vote or refrain from voting at an election or to procure or endeavour to procure the election of any person shall be liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or to both such imprisonment and fine.

(2) Subject to any specific provision to the contrary I any written law relating to an election, any person who is convicted of an offence under this section shall, until the expiration of five years from such conviction, be incapable of being registered or listed as an elector or of voting at an election or of being elected at an election, and if at that date he has been elected at an election, his seat shall be vacated from the date of such conviction. (Emphasis added.)

[41] Section 11(1)(d) states:

Punishment and incapacities for corrupt practice

11 (1) *Every person who*:

(a) commits the offence of personation, or aids, abets, counsels orprocures the commission of the offence or personation;

(b) commits the offence of treating, undue influence or bribery;

(c) prints, publishes, distributes or posts up or causes to be printed, published, distributed or posted up any advertisement, handbill, placard or poster which refers to any election and which does not bear upon its face the names andaddress of its printer and publisher;

(d) *makes or publishes, before or during any election, for the purpose of affecting the return of any candidate, any false statement of fact in relation to the personal character or conduct of such candidate;*

(e) makes or publishes, before or during any elction, for thepurpose of promoting or procuring the election of any candidate, any falsa statement of the withdrawal of any other candidate at such election; or

(f) being a candidate or election agent knowingly makes the declaration as to election expenses required by section 23 falsely, *shall be guilty of a corrupt practice*, and shall, on convection by a Sessions Court, be liable, in the case referred to in paragraphs (a) and (b), to imprisonment for a term not exceeding two years and toa fine of not less than one thousand ringgit and not more than five thousand ringgit, and, in ant other case, to imprisonment for a term not exceeding one year and to a fine not exceeding two thousand ringgit. Offences under paragraphs (a) and (b) shall be seizable offences within the meaning of the Criminal Procedure Code.

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(2) Every person who is convicted of a corrupt practice shall, subject to any specific provision to the contrary in any written law relating to any election, by conviction become incapable of being registered or listed as an elector of voting at any election or of being elected at any election, and if at that date he has been elected at any election, his seat shall be vacated from the date of such conviction.

B

Provided that such disability shall cease on the expiry of five years from such conviction.

(3) A prosecution for a corrupt practice except any corrupt practice as defined in paragraphs (1) (d) and (e) shall not be instituted with the sanction of the Public Prosecutor. (Emphasis added.)

C

[42] This charge/complaint is correctly framed. It has pleaded s 11(1)(d) which connects the offence of publishing false statement of fact in relation to the personal character or conduct of the candidate to s 4A of promoting ill-will

D

and hostility due to this publication and praying for the avoidance of the election under s 32(c) due to this alleged corrupt practice. lt must be noted that the gravamen under s 4A of the Act is the act of promoting feeling of ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia in order to

E

induce them to vote for the respondent or to refrain from voting for the petitioner. This is done through the distribution, pasting and displaying (*mengedar, menampal dan memapar*) of banners in the constituency with the words 'Ubah Sekarang Bersihkan Malaysia' (Change Now Clean Up Malaysia).

F

[43] However, having scrutinised para B of p 9 of the petition, this court is of the view that this paragraph does not speak of race or class as required under s 4A of the Act.

G

[44] In para C of the petition at p 12, the petitioner states:

Perkataan 'Ubah Sekarang Bersihkan Malaysia' adalah perkataan yang jelas mempunyai unsur, niat dan kecenderungan untuk mengembangkan perasaan jahat, tidak puas hati dan *permusuhan antara penduduk dan atau pengundi DUN N23 Penggaram terhadap Kerajaan Malaysia dan khasnya kepada Pempetisyen sebagai*

H

calon Barisan Nasional di DUN yang sama. (Emphasis added.)

[45] In para D at p 12 of the petition, the petitioner states:

Pempetisyen kamu menyatakan bahawa 'Bersihkan Malaysia' bermaksud

I

membersihkan Kerajaan Malaysia yang dipimpin oleh parti Barisan Nasional yang kotor kerana mengamalkan rasuah dan tidak cekap. (Emphasis added.)

[46] In para E of p 14 of the petition, the petitioner states as follows:

Pempetisyen kamu menyatakan juga bahawa 'Bersihkan Malaysia' bukan sahaja

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mengembangkan perasaaan jahat, tidak puas hati dan *permusuhan antara rakyat dan kerajaan* malah ia juga ditujukan kepada watak, kelakuan dan peribadi calon iaitu pempetisyen yang bertanding di atas tiket BN dan dengan itu pempetisyen juga telah dikatakan melakukan perbuatan rasuah sepertimana pemimpin dalam kerajaan BN dan perkara kemungkiran ini adalah satu bentuk perbuatan rasuah atau perbuatan yang menyalahi undang-undang di bawah Seksyen 4A dan turut dibaca bersama di bawah Seksyen 11(1)(d) dan 32(c).

[47] The petitioner alleged that the words contained in these banners has elements, intention and propensity to perpetuate feelings of ill-will, discontent and hostility between residents and voters in *DUN* N23 against the Government of Malaysia and especially the petitioner as a candidate for BN in the constituency.

[48] But s 4A is specific in nature. The allegations by the petitioner is too general and does not go down to specicifics.

[49] As can be seen the allegations in paras B – E do not speak of the ill-will, discontent or hostility being created or perpetuated among the same race or different races or the same class or different classes of the population of Malaysia as required under s 4A of the Act.

[50] The complaints herein essentially relate to feelings of ill-will, discontent or hostility between citizens and the 'Government of Malaysia' and the petitioner as a candidate for *Barisan Nasional* in the state constituency.

[51] In other words, the words in the banners is an instigation to raise the feelings of ill-will, discontent and hostility among the residents and the voters of *DUN* N23 Penggaram towards the government of the day, that is an instigation to change the government which it alleged to be corrupt by not voting the petitioner who being a BN candidate, must, by association, also be corrupt. This does not come under the purview of s 4A.

[52] For it to come within the purview of s 4A, the petitioner has to state or illustrate how the publication of these banners with the words 'Ubah Sekarang Bersihkan Malaysia' (Change Now Clean Up Malaysia) has promoted feelings of ill-will, discontent and hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia in order to induce any voter to vote for the respondent or refrain from voting for the petitioner, or to procure or endeavour to procure the election of the respondent. This, the petitioner failed to do; that is failed to plead sufficient facts or circumstances as required under r 4(1)(b) and 4(4)(3) of the EP Rules 1954 to constitute a cause of action so as to make out a case for the petitioner under s 4A read together with ss 11(1)(d) and 32(c) of the EO Act. As such the

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charge/complaint clearly does not come within the ambit of ss 4A and 11(1)(d) of the EO Act.

[53] For the above reasons, the preliminary objections by the respondent are allowed, and the petition, is hereby struck out.

COSTS

[54] Mr Gobind Singh Deo prayed for RM20,000 for costs and Mr Izzat Muhtar prayed for RM10,000. I ordered costs of RM20,000 to be paid by the petitioner to the respondent, which I feel, in the circumstances, to be fair and adequate.

Preliminary objections allowed and petition struck out with costs of RM20,000.

Reported by Kanesh Sundrum